NO.

In The

Supreme Court of the United States

OCTOBER TERM, 1982

CARMEN E. PAVONE, SR., CARMEN E. PAVONE, JR., and PAVONE, INC.
Petitioners,

VS.

JOHN W. MACY, DIRECTOR
FEDERAL EMERGENCY MANAGEMENT AGENCY
Respondent.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of May, One Thousand Nine Hundred and Eighty-Two.

PRESENT:

HON. WILLIAM H. TIMBERS, Circuit Judge
HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge
HON. AMALYA L. KEARSE, Circuit Judge

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PAVONE, INC., CARMEN E. PAVONE, SR. and CARMEN E. PAVONE, JR.,

Appellants,

v.

JOHN W. MACY, JR., DIRECTOR FEDERAL EMERGENCY MANAGEMENT AGENCY,

Appellee.

---x

ORDER
82-6031

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Pavone, Inc., Carmen E. Pavone, Sr. and Carmen E. Pavone, Jr. appeal from an order of the United States District Court for the District of Connecticut (Burns, J.) granting appellee's motion for summary judgment. Appellants' action sought recovery under a flood insurance policy administered by the Federal Emergency Management Agency.

After due consideration, it is ordered, adjudged and decreed that the judgment of the District Court be and it hereby is affirmed substantially for the reasons set forth in the opinion and order of the Hon. Ellen Bree Burns, District Judge. In reaching this conclusion, we are mindful of the fact that appellants were represented by counsel at all times during the negotiation of their claims.

/s/Hon. William H. Timbers
Hon. William H. Timbers

/s/Hon. Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

/s/Hon. Amalya L. Kearse
Hon. Amalya L. Kearse

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

PAVONE, INC., CARMEN E. PAVONE, SR., and CARMEN E. PAVONE, JR.	)	
v.	)	Civil B-80-29
SECRETARY OF HOUSING AND URBAN DEVELOPMENT	)	

JUDGMENT

This cause came on for consideration of the defendant's Objection to Decision of United States Magistrate by the Honorable Ellen Bree Burns, United States District Judge, and

The Court having considered the defendant's objection and all the papers submitted in connection therewith filed its Ruling on Defendant's Objection to Decision of United States Magistrate sustaining the objection,

It is therefore ORDERED and ADJUDGED that judgment be and is hereby entered for the defendant.

Dated at Bridgeport, Connecticut, this 13th day of January, 1982.

SYLVESTER A. MARKOWSKI, Clerk

By /s/Kevin F. Rowe
Kevin F. Rowe
Deputy-in-Charge

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

PAVONE, INC., CARMEN E. PAVONE, SR., and CARMEN E. PAVONE, JR. :

v. : CIVIL NO. B-80-29

SECRETARY OF HOUSING AND URBAN DEVELOPMENT :

RULING ON DEFENDANT'S OBJECTION TO DECISION OF UNITED STATES MAGISTRATE

On September 3, 1981, the United States Magistrate denied defendant's motion for summary judgment made pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. Defendant, Director of the Federal Emergency Management Agency (FEMA), administers the National Flood Insurance Program[1] under which plaintiff Pavone, Inc., lessee of the individual plaintiffs, was issued a Standard Flood Insurance Policy (SFIP) on December 6, 1978. The SFIP provided $80,000 coverage on plaintiffs' building, located at 2428 Main Street, Stratford, Connecticut, and $20,000 coverage on the contents of the building. Plaintiffs allege that the insured property sustained compensable flood damage on January 21, 1979. Defendant, on the other hand, argues that plaintiffs are barred from recovering for failing to comply with a condition precedent in the SFIP.

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[1]The NFIP was established in 1968 by the National Flood Insurance Act, 42 U.S.C. §§ 4001 *et seq.* From June 6, 1969, until December 31, 1977, the program was managed by the National Flood Insurers Association, which issued policies, processed claims, and defended legal actions. On January 1, 1978, the Department of Housing and Urban Development took over responsibility for the program pursuant to 42 U.S.C. § 4071. On April 1, 1979, responsibility for management of the program was transferred to FEMA.

After reviewing the undisputed facts, the relevant law, and the decision of the magistrate, the Court concludes that summary judgment must be granted for defendant. *See Heyman* v. *Commerce & Industry Insurance Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975) (standard for granting summary judgment).

The SFIP issued to plaintiff corporation plainly requires the insured to submit a "proof of loss" to the insurer within 60 days of the date of the alleged loss. Paragraph O of the General Conditions and Provisions to the SFIP provides:

> The insured shall give written notice, as soon as practicable, to the insurer of any loss, protect the property from further damage, forthwith separate the damaged and undamaged property and put it in the best possible order. Within 60 days after the loss, unless such time is extended in writing by the Insurer, the Insured shall render to the Insurer a proof of loss, signed and sworn to by the insured....

Noncompliance with these requirements bars an insured from recovering for Paragraph T of the General Conditions and Provisions to the SFIP declares "[n]o suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy have been complied with...." Interpretation of these contract provisions is a matter of federal law, *see United States* v. *Kimball Foods, Inc.*, 440 U.S. 715, 726 (1979); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383 (1947); *United States* v. *Allegheny Insurance Co.*, 516 F. Supp. 11, 12 (E.D. La. 1981), and "courts have almost invariably denied recovery where the claimant failed to comply with proof of loss requirements for insurance policies issued under federal programs." *Cross Queen, Inc.* v. *Director*, No. 144/1979 at 5 (D.V.I. September 25, 1980); *accord, Harper* v. *National Flood Insurers Association*, 516 F. Supp. 725 (M.D. Pa. 1981); *Continental Imports, Inc.* v. *Macy*, 510 F. Supp. 64 (E.D. Pa. 1981).

In the instant case there exists no genuine dispute as to whether plaintiffs submitted a "proof of loss" within the required 60-day period. Although plaintiffs submitted a "notice of loss" on January 22, 1979, mere notice does not satisfy the requirements of the contract. Plaintiffs implicitly admit as much by arguing that the purpose of the proof of loss was served by the notice of loss. Moreover, Attachment 1 to plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment is a proof of loss dated April 5, 1979, beyond the permissible 60-day limit. In sum, there is no genuine issue of fact as to plaintiffs' failure properly to submit a proof of loss to defendant.

Conceding the weakness of its argument that notice of loss is the functional and therefore contractual equivalent of proof of loss, plaintiffs, as a fall back position, argue that defendant waived performance of the condition precedent of timely submission of the proof of loss. Despite the fact that defendant's agent inspected the insured property, accepted documentation from plaintiffs,[2] and even made an offer to settle the claim for damage to the building,[3] as a matter of law plaintiffs' claim of constructive waiver must fail because the unambiguous terms of the contract and controlling federal law explicitly preclude oral waiver or waiver by conduct. Paragraph D of the General Conditions and Provisions to the SFIP states

> The extent of the application of insurance under this policy and of the contribution to be made by the Insurer in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

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[2]Memorandum in Opposition to Defendant's Motion for Summary Judgment, Ex. 8.

[3]*Id.*, Ex. 9.

> No permission affecting the insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of the Insurer relating to appraisal or to any examination provided for herein.

This restrictive contract language comports with NFIP administrative regulations which provide

> The [SFIP] and required endorsements must be used in the Flood Insurance Program and no provision of the said documents shall be altered, varied, or waived other than through the issuance of an appropriate amendatory endorsement, approved by the Administrator as to form and substance for uniform use.

44 C.F.R. § 61.1(13(d)). Thus, there can be no doubt that waiver of the proof of loss requirement can be executed only by a proper written document, not shown to exist in this case. While inability to recover for their flood damage will likely present a hardship to plaintiffs, *see Federal Crop Insurance Corp.* v. *Merrill, supra* at 383, the Court is of the opinion that plaintiffs' failure to submit a proof of loss, coupled with the absence of an effective waiver by defendant of this condition precedent, constitutes a legal bar to this action. Accordingly, the objection to the decision of the magistrate is sustained and defendant's motion for summary judgment is granted.

SO ORDERED.

/s/Ellen Bree Burns

ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 7th day of January, 1982.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

PAVONE, INC., ET AL.,	)
	)
Plaintiff,	)
	)
v.	CIVIL NO. B-80-29
	)
JOHN W. MACY, JR., DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY,	)
	)
Defendant.	)

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(b) of the Federal Rules for Civil Procedure, Federal defendant herein moves for summary judgment on the ground that there is no genuine issue in dispute as to any material fact in this case and the Federal

9/3/81. DENIED. Defendant makes four arguments in support of this motion. Three of these arguments focus on plaintiffs' November 2, 1979 demolition of the damaged premises. Specifically, defendant contends that by demolishing the premises the plaintiffs breached their contractual duty: (1) to protect the property from further damage after the flood, (2) to exhibit their property to the insurer, and (3) to eschew all deceit and concealment as required by the principle of *uberrimae fidei.* Each of these arguments is a good one, but each involves disputed issues of fact which simply cannot be decided on a motion for summary judgment. *See, e.g., Heyman* v. *Commerce and Industry Insurance Co.,* 524 F.2d 1317, 1320 (2d Cir. 1975). For example, the trier of fact might well find that during the eleven month period between the flood and the demolition, the defendant not only had a reasonable and adequate opportunity to inspect, but that he did in fact adequately inspect it. Such an inference can be drawn from the fact that defendant made set-

tlement offers prior to the demolition. Arguably, he would not have done so had he not adequately investigated beforehand. Likewise, to the extent defendant asserts that plaintiffs engaged in deceit, concealment or infidelity, he is raising issues which by their very nature are inappropriate for resolution under Rule 56, F.R.Civ.P. *See, e.g., Friedman* v. *Meyers,* 482 F.2d 435, 439 (2d Cir. 1973); *Mazaleski* v. *Truesdell,* 562 F.2d 701, 717 (D.C. Cir. 1977); *Handi Investment Co.* v. *Mobil Oil Corp.,* 550 F.2d 543, 547 (9 Cir. 1977); *Pfizer, Inc.* v. *International Rectifier Corp.,* 538 F.2d 180, 185 (8 Cir. 1976); *Staren* v. *American National Bank & Trust Co. of Chicago,* 529 F.2d 1257, 1261-1262 (7 Cir. 1976). Also see, generally, 6 Pt.2 J. Moore, *Federal Practice* ¶56.17[41.-1].

Defendant's remaining argument (*i.e.,* that plaintiffs failed to comply with a condition precedent by failing to submit a "Proof of Loss" as required by Paragraph O of the policy) is far more troublesome and potentially threatening to plaintiffs' case. Unfortunately, defendant has given this argument no special emphasis and, despite its pivitol criticality, has sandwiched it between his other arguments, which, for reasons noted above, simply cannot be resolved on summary judgment.

Plaintiffs in this case contend that they did provide a "Proof of Loss" of sorts by timely submitting various documents and information to defendant. For now, this creates a factual issue sufficient to withstand summary judgment. However, should defendant cease diffusing his resources and undertake concentrated, focused discover on this narrow issue, upon submission of a properly supported Rule 56 motion, he may well be entitled to summary relief. On this record, however, defendant has not sustained his burden.

/s/Thomas P. Smith

THOMAS P. SMITH, U.S. MAGISTRATE

APPENDIX E

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-1795
MEISTER BROS., INC.,
Plaintiff-Appellant,

—v.—

JOHN W. MACY, JR., Director of Federal Emergency Management Agency,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, PEORIA DIVISION

No. 80-1144—ROBERT A. MORGAN, Judge

ARGUED JANUARY 4, 1982—DECIDED MARCH 29, 1982

Before PELL and SPRECHER, *Circuit Judges,* and MARXEY, *Chief Judge.**

PELL, *Circuit Judge.* The appellant filed this suit in the district court to recover $76,404.61 in building damage and clean-

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*Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

up costs for debris removal allegedly incurred by it and covered under a flood insurance policy issued pursuant to the National Food Insurance Act, 42 U.S.C. § 4001 *et seq.* (1976). The appellee, the Federal Emergency Management Agency (FEMA or Agency) filed a motion for summary judgment predicated solely on the appellant's failure to file a sworn proof of loss within sixty days from the alleged loss, as required by the insurance contract.[1] Summary judgment was granted. The only issue in this appeal is whether the appellant's failure to file a timely proof of loss is a complete defense available to FEMA.[2]

The facts bearing on liability are not in dispute. On or about July 9, 1978, the appellant's commercial premises were damaged by a flood. The General Adjustment Bureau was delegated by the appellee's predecessor the responsibility of assessing the loss for the NFIP. Dennis Bush, an adjustor with the Bureau, was assigned to the investigation.

Bush first inspected the premises on July 10, 1978, and furnished a report on this first visit to the central office of the National Flood Insurance Program. On July 18, 1978, the

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[1]The National Flood Insurance Program (NFIP), created pursuant to the National Flood Insurance Act, is a federally subsidized program, which provides flood insurance at or below actuarial rates. From June 6, 1969 to December 31, 1977, the program was administered by the National Flood Insurers Association, an unincorporated association of insurance carriers under a contract with the Department of Housing and Urban Development (HUD). Effective January 1, 1978, HUD took over adminstration of the program. By executive order on April 1, 1979, FEMA assumed responsibility for administering the program. Because of the occasional changes in the identity of the government agency responsible for administering the program, we collectively will refer to whatever agency was currently administering the program as FEMA, Agency or central office of the NFIP.

[2]The appellant conceded in oral argument that federal law governs the issues in this case. *See, e.g., Continental Imports, Inc.* v. *Macy*, 510 F. Supp. 64 (E.D. Pa. 1981).

appellant submitted a formal Notice of Loss as required by the policy. From July to September, and thereafter until December 22, 1978, Bush made several visits to the site to investigate the loss, to arrange a salvage sale, and to negotiate the amount of the loss to be submitted for reimbursement. Throughout he filed reports of his investigation and negotiations with the NFIP. It is uncontested by the appellee that at no time in this period did Bush ever tender to the appellant a proof of loss form so as to indicate that anything other than the Notice of Loss had to be filed by the appellant within the sixty days. Bush stated it was not his practice to prepare a proof of loss until the parties had reached an agreement on the amount of the loss. Nor is it contested that the Agency had all the information from Bush's reports that it would have had had a proof of loss been filed.[3]

On December 22, 1978, Bush prepared and submitted a proof of loss form executed by the appellant, over three months after the deadline for filing. The form, under a section for stating the "full cost of repair or replacement (building and contents)," had typed in the available space "Partial Payment — Contents $50,000.00." The appellant was subsequently reimbursed $50,000.00 for damage to the contents of the building, and an additional sum of approximately $2,000.00 from the salvage sale. However, Bush continued to investigate and negotiate with the appellant on the settlement offer he had been authorized to make by the central office of the NFIP for the remaining costs of damage to the building and debris removal. None of Bush's reports mention the untimeliness of the proof of loss. No settlement was ever reached on the remaining damages and, as a result, the appellant filed this suit on August 4, 1980.

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[3]There even appears to be some question whether the proof of loss requirement applies to debris removal. Although the cost of debris removal is clearly covered by the policy, the policy requires that the proof of loss contain only "...the interest of the Insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereof [and] all encumbrances...."

The appellee does not contend that the traditional elements of estoppel are not present in this case, but rather that the conduct of the federal agency and its agent were not sufficient to create an estoppel against the United States Government. This court has recognized that, in certain circumstances, estoppel against the United States may be appropriate. *United States* v. *Fox Lake State Bank,* 366 F.2d 962 (7th Cir. 1966); *accord, United States* v. *Lazy FC Ranch,* 481 F.2d 985 (9th Cir. 1973). We have also recognized that the applicability of estoppel to the Government should be evaluated in each case with circumspection. *United States* v. *Strauch,* 637 F.2d 477, 482 (7th Cir. 1980); *Gressley* v. *Califano,* 609 F.2d 1265, 1267 (7th Cir. 1979).

Estoppel against the United States was deemed appropriate in *United States* v. *Fox Lake State Bank,* 366 F.2d 962 (7th Cir. 1966). In another case, *United States* v. *Strauch, supra,* this court declined to apply estoppel against the Government, distinguishing *Fox Lake* and the Ninth Circuit's decision in *United States* v. *Lazy FC Ranch,* 481 F.2d 985 (9th Cir. 1973), as situations in which "the Government specifically encouraged a mistake of which it then took advantage." *United States* v. *Strauch,* 637 F.2d 477, 482 (7th Cir. 1980).

The facts of this case are more closely analogous to those in *Fox Lake* than those in *Strauch.* Bush was an investigator for flood insurance claims clothed with authority to investigate, negotiate, and aid in the processing of claims. The Agency had the same information, at the least, from Bush's report as it would have had from a proof of loss filed within the sixty days. Thereafter, Bush investigated and reported the amounts of the loss and actively promoted ongoing negotiations for the amount of the loss to be included in the proof of loss. Settlement offers were made by Bush with authority from the Agency. No proof of loss form was ever tendered to the appellant. However, on December 22, 1978, Bush prepared and submitted a partial proof of loss form over three months late, upon which the appellant, nevertheless, obtained payment. Negotiations on the remaining loss continued thereafter for several months until the parties had reached an impasse. Given these facts, we find that

the conduct of the Agency and its agent were sufficient to estop the Government from asserting the untimely filing as a defense in any manner. Although it is axiomatic that "[m]en must turn square corners when they deal with the Government." *Rock Island, Arkansas & Louisiana Railroad Company* v. *United States,* 254 U.S. 141, 143 (1920), the "public has an interest in seeing its government deal carefully, honestly and fairly with its citizens." *United States* v. *Wharton,* 514 F.2d 406, 412-13 (9th Cir. 1975).

We emphasize that our holding is of necessity limited to the unique circumstances of this case. In light of the Supreme Court's recent opinion in *Schweiker* v. *Hansen,* 450 U.S. 785 (1981) (*per curiam*), it does appear that generally oral misinformation provided by a government employee does not provide a basis for estoppel against the Government. *See, e.g., Cheers* v. *Secretary of HEW,* 610 F.2d 463 (7th Cir. 1979), *cert. denied,* 449 U.S. 898 (1980). Beyond that, however, it is far from clear when the Government may be estopped. *Compare Corniel-Rodriguez* v. *INS,* 532 F.2d 801 (2nd Cir. 1976); *United States* v. *Lazy FC Ranch,* 482 F.2d 985 (9th Cir. 1973); *United States* v. *Fox Lake State Bank,* 366 F.2d 962 (7th Cir. 1966); *Walsonavich* v. *United States,* 335 F.2d 96 (3d Cir. 1964); *Simmons* v. *United States,* 308 F.2d 938 (5th Cir. 1962); *Semaan* v. *Mumford,* 118 U.S. App. D.C. 282, 335 F.2d 704 (1964); *Eichelberger* v. *Commissioner of Internal Revenue,* 88 F.2d 874 (5th Cir. 1937), *cited in Schweiker* v. *Hansen,* 450 U.S. 785, 792 (1981) (Marshall, J., dissenting). Neither of the parties has attempted to address or articulate any general standard and, therefore, resolution of the issue on a broad basis appears inappropriate in this case. Thus, we limit our holding to the facts of this case and do not intend to intimate in any way an appropriate standard for resolution of future cases until the issue is squarely before this court.

We are simply holding on the quite unique facts of this case that a government agency will not be permitted belatedly to assert a technical defense to a law suit which admittedly, if it had been in a state court against a private insurance carrier,

would not have prevailed. The Agency was not in any sense acting in a sovereign capacity here but was engaged in essentially a private business. We are not saying that the Agency's actions were intentionally designed to cause the appellant not to see to it that a formal proof of claim was filed. We do say here, however, that the actions of paying a part of the claim under a policy which the insurer has treated as being fully applicable to the entire claim, over many months of time, does not permit a withdrawl thereafter from the position clearly and unambiguously taken.

Accordingly, the district court's granting of summary judgment for the defendant is reversed. As there are no other issues regarding the defendant's liability under the policy, the case is remanded to the district court for a determination on the issue of damages alone with summary judgment to be entered thereafter in that amount in favor of the plaintiff.

REVERSED AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit